Supreme Court, U.S.
FILED
07-989 JAN 25 2008
OFFICE OF THE CLERK

No. 1

IN THE

Supreme Court of the United States

MONICA J. APPLEWHITE,

Petitioner

v.

ROBERT BRIBER, *ET AL.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are members of a state agency entitled to "absolute judicial immunity" for racial discrimination in investigating and disciplining a licensee?

PARTIES TO THE PROCEEDING BELOW

Petitioner Monica J. Applewhite was plaintiff-appellant in the proceeding below. Respondents Robert Briber, Dorothy Ciccarella, Mary T. Croll, Stanley J. Grossman, James F. Horan, Robert Kohn, Therese G. Lynch, Rufus Nichols, Antonia C. Novello, Winston S. Price, Lemuel Rogers, Jr., Timothy J. Trost, and Stephen E. Wear, were defendants-appellees in the proceeding below.

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PETITION FOR WRIT OF CERTIORARI

Monica J. Applewhite, M.D., respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment granting absolute judicial immunity to bar a claim of racial discrimination.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-4a) is reported at 506 F.3d 181. The opinion of the District Court (App., *infra*, 5a-25a), which granted defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(6), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 29, 2007. The deadline for filing this petition for a writ of certiorari is January 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 mandates that "[a]ll persons within the jurisdiction of the United States shall have ... the full and equal benefit of all laws and proceedings ... as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1983 mandates that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United

States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable ...."

STATEMENT

Petitioner Monica J. Applewhite, M.D., was a physician practicing medicine in the State of New York for over a decade, from 1986 to 2000, without any malpractice claims. (App., *infra*, 29a; Am. Compl. ¶ 19).[1] She became Board-certified in Obstetrics and Gynecology (OB/GYN) in 1992, and certified in High-Risk Obstetrics in 1999. (*Id.* at 29a, ¶ 20). She was the only African American female physician practicing OB/GYN in the Buffalo area. (*Id.* at 29a, ¶ 19). But through the procedures identified below, she was targeted, investigated and eliminated from her profession as part of discriminatory pattern of administrative action against solo practitioners and African Americans. (*Id.* at 37a, ¶ 73). Though most of Dr. Applewhite's practice was at city hospitals – without complaint – all of the charges against her arose from a white suburban hospital. (*Id.* at 34a, ¶ 55).

The investigatory procedures were as follows. Dr. Applewhite submitted to multiple interviews that included questioning by defendants in this action during their investigation of her. (*Id.* at 32a-33a, ¶¶ 42-43). But no transcription or recording of these interviews was made available to Dr Applewhite,

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[1] This action reaches this Court based on a dismissal of the Amended Complaint, and thus all of its allegations are deemed to be true.

and she was not allowed access to copies of expert reports likely prepared for or by defendants, before or during the interviews. (*Id.* at 33a, ¶¶ 44-46). She was also deprived of copies of any of the reports prepared by an investigator. (*Id.* at 33a, ¶ 49). This was prejudicial to her in a subsequent proceeding, which admitted into evidence over objection a summary by an investigator who had misconstrued her statements. (*Id.* at 33a-34a, ¶¶ 49-53).

On this basis the administrative agency in charge of medical licensure summarily suspended her license *without a hearing*. (*Id.* at 34a, ¶¶ 53, 56).

Dr. Applewhite enjoyed the support of at least two physicians and planned to rely on them for her post-deprivation hearing, but defendants intimidated them by threatening investigations of those physicians' competence, surgical and medical outcomes, and by contacting one of the physician's medical malpractice insurance carriers seeking information about the physician's claims history. (*Id.* at 35a, ¶ 59).

Much later a post-deprivation hearing was conducted before Defendants Rogers, Nicholes and Wear, with Defendant Trost serving as Administrative Officer for the Hearing Committee. (*Id.* at 35a, ¶60). Despite the statutory requirement that such hearings be concluded within ninety days, defendants frequently delayed the hearing such that it was not completed for 15 months. (*Id.* at 35a, ¶¶ 61-62).

The medical expertise of these members of the Hearing Committee was inadequate, consisting of two *retired* obstetricians, neither of whom was certified in high-risk obstetrics, and a state employee who

teaches medical ethics at the State University of New York at Buffalo. (*Id.* at 39a, ¶ 75(g)(i)). Neither of the physicians on the Hearing Committee was independently qualified to assess Dr. Applewhite's patient care decisions and actions, nor was the University professor. (*Id.* at 39a, ¶ 75(g)(ii)). All three members of the Hearing Committee, the members of the Administrative Review Board, and the Administrative Law Judges assigned to Petitioner's case, were subject to undue influence by Defendant Novello, who was the charging party within the regulatory agency (*Id.* at 39a, ¶ 75(g)(iii)).

The hearing suffered from serious procedural flaws. For example, it relied on the hearsay report of the senior investigator, and defendants never provided Dr. Applewhite with exculpatory evidence. (*Id.* at 35a, ¶¶ 63-64). Dr. Applewhite – long without an ability to earn a living as the hearing progressed – was required to pay in advance for copies of the transcript of the proceedings. (*Id.* at 36a, ¶ 65).

Defendants relied on evidence from outside of Dr. Applewhite's records that one of her patients was monitoring blood sugar levels, although such evidence had never been presented to either her or the specialist to whom she referred the patient, nor was such evidence ever shared with Dr. Applewhite or her counsel prior to the hearings. (*Id.* at 38a, ¶ 75(a)(iv)). Petitioner was also denied complete copies of patients' medical records on the ground that New York law guaranteed confidentiality, although defendants shared such records and information with counsel for individuals who eventually sued Petitioner in medical malpractice actions. (*Id.* at 38a, ¶ 75(a)(v)).

Dr. Applewhite's counsel was limited to twenty minutes of summation on the charges deciding her entire professional fate, which was grossly inadequate in light of the medical complexities. (*Id.* at 36a, ¶¶ 67-68).

On or about March 27, 2002, Dr. Applewhite learned that the Hearing Committee had voted to sustain eleven of the twenty-three charges and had voted to revoke her license to practice medicine. (*Id.* at 36a, ¶ 69). She appealed *pro se* to an Administrative Review Board "ARB" on or about April 10, 2002. (*Id.* at 36a, ¶ 70). On or about July 29, 2002, an ARB composed of Defendants Briber, Grossman, Lynch, Price and Pellman upheld the Hearing Committee's determination and order. (*Id.* at 36a, ¶ 71).

Dr. Applewhite then sued in federal court in the Western District of New York under 42 U.S.C. §§ 1981 and 1983, with jurisdiction based on 28 U.S.C. §§ 1331 and 1343, but the trial judge never reached the merits of her claims. On March 14, 2006, the trial judge held that there is absolute judicial immunity to protect the decision of the medical board. Dr. Applewhite appealed.

Although noting that "Applewhite claims that Defendants-Appellees engaged in race discrimination against her in violation of § 1983," the Court of Appeals for the Second Circuit dismissed her Amended Complaint without reaching its merits. (App., *infra*, 1a-4a).

Dr. Applewhite petitions here for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Absolute judicial immunity should not insulate from judicial review a claim that a regulatory agency has engaged in racial discrimination. Allegations of racial discrimination, taken as true on the motion to dismiss at issue here, cannot be dismissed without even inquiring into their merits. The Second Circuit erred and conflicted with other Circuits and the teachings of this Court in applying a broad absolute judicial immunity to alleged discrimination by a State regulatory investigation, which included summary suspension of Petitioner's license.

The lower court based its holding of absolute immunity for racial discrimination on the procedural technicality of how "the board articulates its findings and conclusions in a binding order - as opposed to a mere recommendation - under a preponderance of the evidence standard." (App., *infra*, at 2a) While procedural fairness can help reduce discrimination, there is no reason to think it completely eliminates discrimination and absolute judicial immunity is inappropriate and unwarranted by statute or precedent. This is an issue of national importance and a writ of certiorari is necessary here to resolve it.

I. CIRCUITS ARE DIVIDED OVER WHETHER "ABSOLUTE JUDICIAL IMMUNITY" APPLIES BROADLY TO STATE AGENCIES, EVEN WHEN THERE IS RACIAL BIAS.

The decision below – which held there is no cause of action for racial discrimination because these state regulators enjoy "absolute judicial immunity" – expressly and implicitly conflicts with rulings in other Circuits and creates the need for resolution by this Court. (App., *infra*, 2a).

The federal district court in the D.C. Circuit, for example, rejected the notion that immunity for federal officials in the prosecutorial context requires dismissal of a pleading for racial discrimination. "If they have engaged in racially discriminatory practices proscribed by §§ 1981 or 1985, the plaintiffs should not be stopped at the threshold." *NAACP v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976). This comports with the general rule disfavoring dismissal on the pleadings, even though "it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

The less onerous standard of qualified immunity is both common and adequate to protect state administrative agencies in their decision-making processes. *See, e.g., Cullinan v. Abramson*, 128 F.3d 301, 308 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) ("Absolute immunity is not the norm .... For executive branch officials in both state government and federal government, ... 'qualified' immunity is generally deemed sufficient to vindicate the important public interest in allowing government

officials to do their work without undue fear of being haled into court for perceived missteps.") (citations omitted). Only a few Circuits have gone as far as to apply absolute judicial immunity to licensure decisions, and problems identified in the Amended Complaint were lacking in those cases. *See, e.g.*, *Guttman v. Khalsa*, 446 F.3d 1027, 1032-34 (10th Cir. 2006); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 923-26 (9th Cir. 2004); *Wang v. N.H. Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995).

The decision below conflicts with the rulings in other Circuits in the scope of the absolute immunity. In *Mishler v. Clift*, the Ninth Circuit affirmed application of judicial immunity to medical boards but narrowed its scope. 191 F.3d 998 (9th Cir. 1999). Similarly, the discrimination below should not be *entirely* protected by judicial immunity. Numerous aspects of the allegations, taken as true, are unsuitable for judicial immunity. For example, the violation of the statutory requirement for the completion of the hearing in 90 days – taking 15 months instead – constituted a jurisdictional defect that should place the action outside of judicial immunity (App., *infra*, at 35a, ¶¶ 61-62), as absolute immunity does not even insulate a judge when he acts clearly beyond jurisdiction. *See Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *see also Forrester v. White*, 484 U.S. 219, 221 (1988) (limiting judicial immunity in the context of a Section 1983 claim for discrimination). Absolute immunity is also unsuitable for the summary suspension below without a hearing, which was plainly not judicial in nature. *See Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974).

The decision below also conflicts with the Tenth Circuit, which likewise limited the scope of absolute immunity in an analogous context. "The doctrine of absolute immunity, however, is not without limits. Prosecutors and other government officials are not entitled to immunity for administrative and investigative actions that may have influenced the decision to file criminal charges." *Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007). The Tenth Circuit quoted *Hartman v. Moore* for the rule that a defendant may proceed in a retaliatory prosecution action against an official "who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute." 547 U.S. 250, 262 (2006). A writ of certiorari here is needed to resolve these conflicts.

The decision below also conflicts with a civil rights decision rendered by the Michigan Supreme Court in the analogous context of hospital peer review. *Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663 (2006). It denied immunity to a hospital for decisions made about peer review, observing that courts should not defer on all medical issues to state or hospital administrators whose procedures are inadequate and whose motives can be suspect:

> Additionally, we are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a

> grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute. ... [W]hen those staffing decisions violate the legal rights of others, the judiciary must exercise its obligation to adjudicate legal disputes, except to the extent that the citizens of this state, through their elected representatives, have made a policy choice to shield such decisions from liability.

Id. at 680. Likewise, neither Congress nor the State of New York has established absolute judicial immunity for state medical boards.

A different panel of the Second Circuit itself demonstrated the unsuitability of absolute judicial immunity for the procedures utilized in New York for medical licensure. *See DiBlasio v. Novello*, 344 F.3d 292 (2d Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). In *DiBlasio*, the Second Circuit observed that "the key to whether a prosecutor should be afforded absolute immunity is the degree to which the specific conduct at issue is 'intimately associated with the judicial phase of the criminal process.'" 344 F.3d at 300 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) and *Burns v. Reed*, 500 U.S. 478, 486 (1991)). Dr. Applewhite received few of the procedural protections attendant to a criminal, or even a civil, judicial process.

None of the factors established by this Court in determining whether absolute judicial immunity is appropriate exists in this case. In *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985), this Court established the factors to be used:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Id. at 202.

Each factor established by this Court weighs against absolute judicial immunity in this regulatory context. There is no suggestion of harassment or intimidation of medical board officials, and particularly not in connection with claims of racial discrimination. Dr. Applewhite, after all, was the only African American female OB/GYN in the Buffalo area, so there could hardly be a rash of similar claims by others. As to safeguards against discrimination and unconstitutional conduct, there are none of significance. Moreover, as to criterion (c), there are enormous distortions of the process by hysterical and irrational publicity about supposedly unsafe physicians. As to criterion (d), there is no adherence to precedent by state medical boards, as two physicians (perhaps one white and one black) with similar records can receive vastly different discipline. Finally, the adversarial nature of the process is inadequate and there is no meaningful procedure for correcting errors on appeal. Once Dr. Applewhite was summarily suspended *without a hearing*, the die was cast and her outcome was preordained.

Of all these criteria, the lack of insulation from political influence or distortion is particularly important, and indicates the inappropriateness of

absolute judicial immunity for medical boards. Once medical boards publicize their summary suspensions, as was done here, devastating media stories essentially preclude a fair post-deprivation hearing. Within days of Dr. Applewhite's summary suspension, the Associated Press circulated such a story. "State suspends license of Buffalo-area doctor," Associated Press (July 3, 2000). From that point forward, the state medical board has every political reason to strain to justify its decision, made without due process, and to avoid admitting publicly that it made a mistake. This process renders meaningful due process impossible, and absolute judicial immunity should not apply.

Moreover, specific procedural safeguards found lacking by this Court in *Cleavinger* – and thus inadequate to justify absolute immunity – are likewise lacking here. There, as here, the "defendant" in the proceeding lacked a meaningful right to compel attendance of witnesses or cross-examine them, could not conduct full discovery, was not afforded a verbatim transcript, and could not prevent hearsay evidence. *See Cleavinger*, 474 U.S. at 206; App., *infra*, at 33a, ¶ 49, 35a, ¶ 62.

Not even a criminal prosecutor enjoys the sweeping absolute judicial immunity granted below to the New York medical board officials, despite the claim of racial discrimination. "Before any formal legal proceeding has begun and before there is probable cause to arrest, ... a prosecutor receives only qualified immunity for his acts." *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir. 1995) (emphasis added). Much of what Dr. Applewhite asserts in this case concerns investigatory actions, for which no

immunity should attach. (App., *infra*, at 32-34a, ¶¶ 42-52).

II. APPLYING "ABSOLUTE JUDICIAL IMMUNITY" TO PRECLUDE REVIEW OF STATE REGULATORY DECISIONS, EVEN WHEN MOTIVATED BY RACIAL ANIMUS, IS AN ISSUE OF NATIONAL IMPORTANCE.

Redressing racial discrimination is an issue of national importance, and has been identified by this Court as a compelling interest in other contexts. "[R]emedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007). The elimination of the only African American female OB/GYN physician in the Buffalo area below has as much, if not more, social significance as school issues.

New York can narrowly tailor regulatory remedies for addressing perceived shortcomings in medical practice. It can order remedial training; monitoring or supervision; restrictions on permissible procedures; temporary suspensions without publicity; and fair hearings before completely destroying a physician who, like Dr. Applewhite, had served patients well for more than a decade. The abrupt summary suspension of a physician's license with publicity and without meaningful accountability for racial or other discrimination is simply inconsistent with the protections of 42 U.S.C. §§ 1981 and 1983, and there is a strong national interest in enforcing those federal protections.

As three Justices of this Court emphasized in a separate concurrence in *Imbler*:

> I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history.

Imbler v. Pachtman, 424 U.S. at 433 (White, J., concurring) (emphasis in original).

Lower courts have struggled to resolve uncertainties left by this Court's last major ruling in this area, in *Butz v. Economou*, 438 U.S. 478 (1978). In that case, unlike here and most state regulatory proceedings, there was ample opportunity "to challenge the legality of the proceeding." *Id.* at 515. The *Economou* Court granted absolute immunity to a federal official only because there "[a]n administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified." *Id.* at 515-16. Those procedural safeguards are lacking here, where a summary suspension was imposed on Dr. Applewhite and was publicized without adequate due process. The *Economou* precedent is being applied too broadly by lower courts. *See, e.g.*, Catherine A. Daubard, "NOTE: Quasi-Judicial Immunity of State Officials: *Butz v. Economou's* Distorted Lecacy," 1985 U. Ill. L. Rev. 401 (describing how lower courts have misapplied quasi-judicial immunity at the state level under *Economou*").

Monica Applewhite satisfied the notice pleading requirements to state a claim for discrimination under Sections 1981 and 1983. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (rejecting a "heightened pleading standard" in civil rights cases alleging liability under Section 1983). Certiorari should be granted for a remand of this case to proceed on its merits.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted here.

Respectfully submitted,

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